FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 30 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 522

UNITED STATES *ex rel.* GEORGE E. THOMPSON,
Petitioner

v.

WILLIAM LENNON, Sheriff of Philadelphia,
Respondent

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE THIRD CIRCUIT

LANDON GERALD DOWDEY
JOHN J. O'DOWD
Counsel to Petitioner
1333 G St., N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Summary Statement	1
Point 1: The Court Below adjudicated the merits of the Petition for Habeas Corpus	2
Point 2: Administrative Action Impeding Review	3
Appendix A: Special Order of Secretary of Navy	8
Appendix B: Sample Disciplinary Letter	9

TABLE OF CASES

Frisbie v. Collins, 342 U.S. 519	3
Graves v. New York ex rel. O'Keefe, 306 U.S. 466	4
Howard v. Commissioners, 344 U.S. 624	5
Kiker v. Philadelphia, 346 Pa. 624, 31 A2d. 289, cert. den. 320 U.S. 741	5
Philadelphia v. Cline, 158 Pa. Super. 179, 44 A2d. 680, cert. den. 328 U.S. 848	5
Thomas v. Arizona, 356 U.S. 390	3

OTHER REFERENCES

Public Salary Tax Act, 53 Stat. 575	4
Senate Finance Subcommittee Hearings on H.R. 6687, April 23, 1940, 76th Cong., 3rd Sess.	5
Bureau of the Budget, Circular No. A 38 (Revised) of 23 December 1954	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 522

UNITED STATES *ex rel.* GEORGE E. THOMPSON,
Petitioner

v.

WILLIAM LENNOX, Sheriff of Philadelphia,
Respondent

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR CERTIORARI

Petitioner respectfully urges the Court to grant a rehearing on its order of January 12, 1954, denying the petition for writ of certiorari herein, and to grant said petition; and for reason therefor shows the following grounds not previously presented which are believed to be substantial:

1. Although the precise ruling of the court below was seemingly on a discretionary point: that the

petition for habeas corpus was premature for failure to exhaust state remedies; analysis will show that this ruling stems not from an exercise of discretion, but from a determination of questions of law which go to the merits of the petition. The promise of future proceedings in state or federal courts (R. 16a, 22a, n. 24) is therefore an empty one, and the merits of the petition are now presented to this Court for review.

2. Moreover, in appraising the importance of the questions raised on the merits, and the urgency of reiew by this Court at this time, the Court should consider certain administrative action taken by the federal government which, in practical operation, has in the past and will in the future prevent review of this important question.

1. The Court Below Adjudicated the Merits of the Petition for Habeas Corpus

Admittedly the ruling of the lower court was *in form* a dismissal for failure to exhaust state remedies, leaving open the question on the merits until after that had been accomplished (R. 14a, 16a, 22a, n. 24).

But the court also plainly based its dismissal on the merits (R. 17a) and proceeds to discuss and rule upon the merits (R. 17a-22a).

This ruling on the merits in conjunction with a ruling designed to postpone decision on the merits, while awkward, is less inconsistent than it might at first appear. The discussion captioned "This court should not exercise its discretion to grant the writ at this time under the circumstances of this case," does not purport to be a "factual appraisal by the court in each special situation," as required by

Frisbie v. *Collins*, 342 U.S. 519, 521. Instead it is devoted exclusively to citation and quotation at length from cases concerned only with the general rule on exhaustion of state remedies. The only mention of "special circumstances" admitting any departure from this general rule is relegated to a footnote (R. 15a, n. 7). But it there appears that the lack of "special circumstances" depends on the court's legal determination that "Petitioner's failure to pay his local taxes was not part of his duties as a civilian employee of the federal government." For the basis of such ruling we must refer to the merits. Since petitioner had no local contact independent of the performance of his duties as a federal employee within a federal enclave, his duties with respect to the local tax (and penal laws) would depend entirely upon a construction of the revelant Acts of Congress and the 4th and 5th Amendments to the Constitution. This is not simply *a* question of law, this is *the* question of law basic to the merits of the petition.

The lower court has ruled on the merits, as such, and as the basis for its holding that the petition for habeas corpus was premature. The promise of future proceedings is therefore illusory, and the merits are before this Court. *Thomas* v. *Arizona*, 356 U.S. 390, 392, N. 1.

2. Administrative Action Impeding Review

It is only by grace of a special order of the Secretary of the Navy, reprinted in Appendix A to this Petition, p. 8, that this case has progressed thus far. The denial of certiorari by this Court in two prior cases involving the same matter, although not the same claims or circumstances, has had the practical effect

of approval of those state court holdings insofar as the relationships between the City of Philadelphia and the Naval Shipyard are concerned. The City has demanded and been provided by the Shipyard with names, addresses, and earnings of its New Jersey employees (Bureau of the Budget, Circular No. A 38 (Revised) of 23 December, 1954). The Shipyard has attempted to reduce the burdens cast upon it by the enforcement methods of the City (shown in an amendment to the petition, R. 11a) by threatening disciplinary action against federal employees who fail to settle the tax obligation with the City. A sample Shipyard letter to this effect is reprinted in Appendix B hereto, p. 9a. Many federal employees have left their employment as a result of the City's attempts to enforce the tax (R. 11a). Others have been discharged for failure to comply with what the Shipyard conceives to be their legal obligation with respect to this tax and its enforcement. An action contesting the right of the federal government to enforce such determination of its employee's rights is now pending in the United States District Court for the District of Columbia (C.A. No. 2821-58). But this will not settle the merits of this case.

Yet there has been no prior ruling by this Court, or by any federal court, on this subject. Since the removal of the general state tax immunity from federal salaries in *Graves* v. *New York ex rel O'Keefe*, 306 U.S. 466, and the companion Public Salary Tax Act, 53 Stat. 575, all of which occurred within the space of two weeks in 1939, there has been no further exposition upon the subject by this Court. Specifically there has been no ruling on whether the performance of duties by federal employees, as such, and without

any other local contact, may be made the subject of local taxation. The subject was touched upon by the minority in *Howard* v. *Commissioners,* 344 U.S. 624, 629, the only federal employee tax case to reach this Court within the last twenty years. However, the majority did not discuss the matter, presumably because there was in that case a local contact independent of Federal employment, namely, residence in the same county in which the taxing city was located.

In this void stands *Kiker* v. *Philadelphia,* 346 Pa., 624, 31 A. 2d 289, Cert. den. 320 U.S. 741, and its derivative, *Philadelphia* v. *Cline,* 158 Pa. Super. 179, 44 A. 2d 680, Cert. den. 328 U.S. 848. While neither case specifically discusses the points raised here, their disposition by silence, thrust upon the vast impersonal federal personnel machinery, has virtually placed them beyond challenge by the ordinary federal employee.

The phrase, "thrust upon," is deliberately chosen. Departmental acquiescence is plainly a consequence of the pre-eminence of the *Kiker* case on this subject. Certainly at the time of the hearings on the Buck Act neither the Administration nor Congress entertained such a view. See for example, Senate Finance Subcommittee Hearings on H. R. 6687, April 23, 1940, 76th Congress, 3rd Session, page 26, and discussion in the amicus brief of the State of New Jersey, pp. 7-8. When the day comes that some important or secret federal agent is arrested by local authorities for failure to furnish information on a local tax return about his comings and goings in a community away from his home, perhaps the federal government will direct its discomfiture with the situation at someone other than its own employees. But this may happen

too late for the federal government to repudiate its acquiescence, and certainly too late to relieve now helpless federal employees.

No federal-state controversy could be more direct and basic than the exercise of State jurisdiction to tax, fine, arrest, and imprison federal employees upon the single jurisdictional event of their having performed their duties as federal employees inside the State's borders, and moreover, within a federal enclave therein. Unfortunately litigation of such a controversy is beyond the means of the ordinary federal employee. Even here, where a single group of over 2000 is directly involved, it is difficult. Federal employees are restricted by the threat of disciplinary action. They are circumscribed by a prohibition against partisan political activity. They lack a substantial, well organized, well financed bargaining group.

In the face of this situation, only heroic persistence, fed by gross injustice and cruel methods of enforcement has produced a vehicle for determining the important questions presented here. But heroism has its limits. Few will be found with the necessary temerity to raise this question again, and the construction and validity of fundamental federal legislation will have been conclusively settled by a single State court and the denial of certiorari here.

LANDON GERALD DOWDEY
JOHN J. O'DOWD
Counsel to Petitioner
1333 G St., N. W.
Washington 5, D. C.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to substantial grounds available to petitioner although not previously presented.

LANDON GERALD DOWDEY

Appendix A: Special Order of Secretary of the Navy

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

JAG:132:cms
30 Mar 1957

From: Secretary of the Navy

To: Commandant, Fourth Naval District

Subj: Service of process in connection with enforcement of Philadelphia Wage Tax against employees of Philadelphia Naval Shipyard

Ref: (a) Sec Nav ltr of 20 Dec. 1956

Encl: (1) Copy of Sec. Nav. ltr to Senator Case of even date

(2) Copy of Sec. Nav. ltr to Mr. Landon G. Dowdey of even date

1. Reference (a) approved the proposal to permit service of process within the Philadelphia Naval Shipyard in connection with the Philadelphia wage tax for purpose of a test case on the conditions requested by the Commandant that the variation in procedure be limited to the test case only and that the City authorities consent. I have now been informed that the City authorities are not agreeable to this proposal.

2. Upon further consideration of the matter, I have reached a decision that regardless of the nonconcurrence of the City officials, it will be in the best interests of the Navy to give the employees an opportunity to attempt to have this matter resolved by a federal court.

3. It is therefore directed that when an appropriate case presents itself, involving a New Jersey resident, arrangements be made for service at some place within the Shipyard which is decided upon by the Commander

of the Shipyard. Sufficient advance notice should be given to Mr. Landon G. Dowdey, the attorney who represents the Wage Tax Protest League of New Jersey.

4. The above requirement applies to only one case. The procedure generally will not be changed, at least until the outcome of the test case is known.

(s) W. B. FRANKE
Assistant Secretary of the Navy

Appendix B: Sample Disciplinary Letter

PHILADELPHIA NAVAL SHIPYARD
NAVAL BASE
PHILADELPHIA 12, PA.

16 November 1954

From: Commander, Philadelphia Naval Shipyard
To:
Subj: Tax Delinquency

1. Information has been received from the Department of Collections, City of Philadelphia, indicating that you are delinquent in paying the Wage Tax for the years and in the amounts listed below.

Year	Amount

2. While neither the Navy Department nor the Shipyard considers itself a collection agency or arbitrer concerning the validity of a debt, both do expect employees to assume a responsible attitude towards their obligations. Failure on your part to assume such an attitude will be considered sufficient reason to initiate disciplinary action or to suspend or separate

you from employment. It is therefore unquestionably to your interest to make immediate arrangements to settle this matter satisfactorily.

3. Future communications concerning this matter will be made an official part of your record and will be considered when personal actions of importance are taken.

P. W. HAAS, JR.
D. A. READER
by direction